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In The

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October Term, [redacted] 1960

Number [redacted] 981

Joseph Thomas, Joseph Martin, Leroy Henderson, Eldad Walker, Jessie Gooden, Russell Roberts, Jack Boyd and Ozzie Smith, Jr.,
Appellants,

v.

People of the State of Michigan,
Appellee.

Appeal from the Recorder's Court of the City of Detroit

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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IN THE

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OCTOBER TERM, 1959

Number 954

JOSEPH THOMAS, JOSEPH MARTIN, LEROY HENDERSON, ELIJAH WALKER, JESSIE GOODEN, RUSSELL ROBERTS, JACK BOYD AND OZZIE SMITH, JR.,
Appellants,

v.

PEOPLE OF THE STATE OF MICHIGAN,
Appellee.

Appeal from the Recorder's Court of the City of Detroit

BRIEF IN OPPOSITION TO MOTION TO DISMISS

The Appellants respectfully submit that the Motion to Dismiss filed by the Appellee be denied. We consider in this brief the more material points raised by Appellee's Motion to Dismiss.

ORDINANCES AND STATUTES INVOLVED

It is to be noted that Appellee agrees that the "applicable provisions of the Michigan Statutes and Ordinances involved herein are correctly set forth in a Statement as to Jurisdiction (p. 2)." Appellants assert therefore that it is irrelevant to the constitutional questions and issues presented to this Court that the alleged acts are characterized as "a felony", or "a misdemeanor". As a matter of fact, however, the acts which the applicable Michigan Statute proscribes constitutes a "high misdemeanor".

STATEMENT OF THE CASE

Appellants invite the Court's attention to their "Statement of the Case" as presented on p.p. 5-14 of the "Statement as to Jurisdiction". Appellants assert that Appellee's Statement of the Case recites partial testimony out of context and gives a misleading impression for an evaluation of this case.

Moreover, Appellee is factually wrong wherein he asserts as a material and accurate fact "the speaker, later identified as defendant ELIJAH WALKER, refused, and continued to talk to the crowd; the sergeant then stepped to the stand and asked the crowd to move down the street, away from the intersection; Walker pulled him down and beat him about the neck; other officers intervened and seized Walker, and the crowd rushed at the officers" (p. 3. Motion to Dismiss).

The alleged fact as to who the speaker was is pivotal and strategic in this case. The transcript clearly indicates that the party who was speaking and who is identified as ELIJAH WALKER, both at trial and in Appellants' Statement of the Case was in fact Mr. CARA WOODS, who is not a defendant. (Transcript p. 144—Testimony of December 16, 1957). This material error on the part of Appellee should reasonably cast doubt upon the remainder of the Appellee's Statement of the Case.

QUESTIONS PRESENTED

The Appellants have properly raised and presented substantial constitutional questions as the bases for this Court to exercise jurisdiction (p.p. 4-5 Statement as to Jurisdiction). Appellants assert that the questions therein presented were properly raised. More particularly Appellants' reply to Appellee's assertions that

(1) "The defendants were not convicted of violating these Ordinances but were convicted of violating 750.479, C.L. 1948. The cases cited by Appellants in

support of their claim that this Court has jurisdiction in this matter resulted from convictions for violating the ordinances involved."

(2) "The Michigan Court did not at any time determine the constitutionality of these ordinances, and therefore this Court is precluded from determining these questions at this time. As was held in Walters v. City of St. Louis, et al, 347 U.S., 98 L. ed 660. "The United States Supreme Court will not undertake to review what a state court below did not decide." (p. 5—Motion to Dismiss).

Appellants assert that the State Court below did rule by its disposition of Appellants' Request to Charge. Appellants invite this Court's attention to Request to Charge six (6), seven (7) and eight (8). See Appendix. The denial of these requests certainly constitute a ruling of the Court on the ordinances in question and their constitutionality.

It will be noted, therefore, that the Appellee is in error when it states that "the defendants were not convicted of violating these ordinances," and that "The Michigan Court did not at any time determine the constitutionality of these ordinances."

The Appellants, moreover, assert they have urged that the ordinances in question are unconstitutional on their face, *and as applied*. In short, appropriate constitutional questions were properly raised and presented that create the bases for the assumption of jurisdiction by this Court.

In point number four (4) of Appellee's Motion to Dismiss on page 9, Appellee admits that the Information under which Appellants were charged and convicted "does not state that they wilfully and knowingly committed the acts for which they were convicted."

Appellee then cite that section 750.479 CL 1948 "provides that the actions must have been performed "Wilfully and Knowingly."

This strategic and pivotal ingredient of the offense charged was omitted by Appellee and the Court despite Appellants' repeated Motions and Objections, until the final act of charging the jury on the part of the Court. This essential ingredient was omitted from the Information, the examination, the entire trial and proofs and cross-examination, and argument of the prosecutor and counsel. The only point in the entire trial at which this essential ingredient was brought to the attention of the jurors was by the Court in his Charge to the Jury. p. 3 Appendix—Statement as To Jurisdiction.) It is clear, therefore, that the Defendants and Appellants were deprived of due process, were not given a reasonable notice of the charges made against them, and were not afforded an opportunity to examine adverse witnesses on the charge of which they did not have notice. The Appellants are being sent to prison on a charge not made or tried. This is error. Cole v. Arkansas, 33 U.S. 196, Kovacs v. Cooper, 336 U.S. 77, Marsh v. Alabama, 326 U.S. 501, Saia v. N.Y. 334 U.S. 558, Williams v. New York, 337 U.S. 241.

CONCLUSION

Accordingly it is respectfully requested that the Motion to Dismiss filed by Appellee be denied.

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APPENDIX

REQUEST TO CHARGE

6. I further charge you that in order to find each of the Defendants guilty of the offense charged, you must find beyond a reasonable doubt that Sgt. NEUENDORF was in the lawful performance of his duties and that for said duties to be lawful, you must find as a matter of fact, beyond a reasonable doubt, that "a person or persons did make or assist in making any noise, disturbance or improper diversion, or rout or riot, by which the peace and good order of the neighborhood are disturbed" or that "persons did assemble, congregate or gather with others in crowds on any sidewalk or street in such a manner as to obstruct or incommode public travel or the public use and enjoyment of same."

I charge you further that a violation of either or both of the ordinances in the presence of an officer must be proved beyond a reasonable doubt as an essential requirement of the offense charged and that unless you find such a violation to have existed, you must find each of the defendants not guilty.

7. I further charge you that the Defendants and each of them did have a constitutional right under the United States and Michigan Constitutions to use the sidewalks and streets for the exercise of their rights of freedom of religion, freedom of assembly and freedom of speech and that it is not lawful for officers to enforce or regulate conduct thereunder an ordinance or ordinances in such a way as to abridge or deny these constitutional rights of the Defendants.

8. I further charged you that the Defendants are also charged with violating two ordinances of the City of Detroit; These ordinances alleged to be involved are:

"It shall be unlawful for any person to assemble, congregate or gather, with others in crowds on any sidewalk

or street, or upon the Campus Martius, in such a manner as to obstruct or incommode public travel or the public use of enjoyment of the same", and

"Any person or persons who shall make or assist in making any noice, disturbance or improper diversions, or any rout or riot, by which the peace and good order of the neighborhood are disturbed, shall be guilty of Disorderly Conduct and shall be punished as hereinbefore provided".

Now it is the contention of the defense that the first ordinance is unconstitutional on its face, and if not unconstitutional on its face, the application of the said ordinance is unconstitutional because it places blocking and obstructing of traffic above the rights of freedom of speech, freedom of assembly and freedom of religion as guaranteed by the Federal and State Constitution. Now I charge you as a matter of law that the Constitutionality or unconstitutionality of a law, ordinance or statute is within the province of this Court and you may not pass on this phase of the matter, but it is within the province of the jury as the trier of facts whether or not these eight Defendants did congregate, assemble or gather on the streets of Hastings and Livingstone in such a manner as to obstruct or incommode public travel or the public use of enjoyment of the same. I further charge you that you must find beyond a reasonable doubt, as hereinbefore defined, that the defendants, and each of them, did assist in making noise, disturbance or improper diversions or rout or riot by which the peace and good order of the neighborhood was disturbed; in the presence of the said MAX NEUENDORF; That I further charge you that you must take into consideration the testimony as given and determine whether or not there had been a disturbance of the peace prior to the arrival of the police and that it became necessary for the police to take the action described because of the disturbance; If you find that there was no disturbance of the peace

by each of the defendants prior to the time that MAX NEUENDORF arrived then you must find each of them not guilty, but on the other hand if you find from the testimony beyond a reasonable doubt that at the time that MAX NEUENDORF arrived at the scene the said MAX NEUENDORF found that there was a disturbance of the peace by each of these Defendants in the presence of MAX NEUENDORF, then it is your duty to return a verdict of guilty for each of the Defendants, or to such Defendants that you find are guilty of such act or acts as determined by the evidence beyond a reasonable doubt.

I have stated to you that these violations of these ordinances must have been in the presence of MAX NEUENDORF because unless a Misdemeanor is committed in the presence of a Police Officer he has no legal right to make an arrest without a valid Warrant. I further charge you that each of the Defendants that are charged of violating the law must have violated the law in the presence of MAX NEUENDORF, because the Information only charges the Defendants with acts against the said MAX NEUENDORF and until the Information is proved as charged, you must acquit the defendants.